Chong Choong Hing v Tan Yee Lee (As president of the Wai Fung Wan Keng Philanthropic Amateur Dramatic Society)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–449–1994
JAMES FOONG J
27 MARCH 1995

Civil Procedure *— Pleadings — Necessity for express pleadings — Competency of unincorporated society to hold tenancy — Issue not pleaded — Whether could be raised at trial*

Landlord and Tenant *— Controlled premises — Subletting — Owner attempted to convert subtenancies to joint tenancies — Decontrolling of premises upon owner's application — Chief tenant not notified — Subtenants surrendered vacant possession to owner — Whether conversion to joint tenancies effective — Whether chief tenant entitled to possession of premises when subtenants leave — Control of Rent Act 1966 s 20(2) & (3)*

In 1993, the plaintiff became the owner of a rent-controlled building ('the property') governed by the Control of Rent Act 1966 ('the Act') which had been rented out to the defendant's society since 1941. The society occupied the first floor of the property, while the ground floor ('the premises') was sublet by the society to two subtenants ('the subtenants'). The plaintiff issued letters to the subtenants accepting them as joint tenants but did not notify the defendant. Thereafter, the subtenants agreed to hand over vacant possession of the premises to the plaintiff for a consideration of RM1,000 each in order for him to apply to the rent tribunal to decontrol the premises. Subsequently, the rent tribunal issued certificates to decontrol the property. When the society found out that their subtenants had vacated, they immediately occupied the premises, claiming that it was part of the property, and hence should revert back to them as chief tenants. The defendant also alleged that neither he nor the association had been notified of the plaintiff's attempt to convert the subtenancies into joint tenancies and they were also not served with any certificate issued by the rent tribunal declaring the premises as decontrolled. The plaintiff sued the defendant for, inter alia, trespass, and applied for summary judgment to restrain him from entering the premises, contending that when the premises were surrendered by the subtenants, the joint tenancies were terminated, thus giving him the right to apply for the premises to be decontrolled and to occupy the premises. At the trial, the plaintiff's counsel also raised the issue that the defendant and/or his society was incompetent to hold a tenancy of the property under s 9(b) of the Societies Act 1966.

Held, dismissing the application:

(1) Section 20(2) of the Act allows the landlord to treat existing subtenants of his property as joint tenants upon notification of such intention to the tenant whereupon the joint tenancies shall exist as if the landlord himself has directly let the premises to the subtenants. Section 20(3) provides that where no such notification is made, the subtenancy created by the tenant shall continue as subtenancy. In this instance, the 'tenant' referred to the defendant and his society. It follows that without the notification, the plaintiff's attempts to turn the subtenancies into joint tenancies were futile, and the subtenancies continued as subtenancies.

(2) The surrender of the premises to the plaintiff by the subtenants was tantamount to a termination of the subtenancies. Once the subtenancies were terminated, the premises reverted back to the defendant or his society as chief tenant, for under common law, subtenancies flow from the main tenancy and have no independent existence. The plaintiff could only have possession of the premises with the consent of the chief tenant, otherwise the plaintiff would be in breach of the tenancy for failing to provide quiet enjoyment of the property.

(3) Section 24(2) of the Act only provides that a person holding over in decontrolled premises is deprived of the benefits of the Act, but does not provide that such person is a trespasser. Further, in order for the premises to be treated as decontrolled premises, the plaintiff should have served on the subtenants the certificate issued by the rent tribunal to decontrol such premises as provided under s 24(2).

(4) The denial of the legal existence of the defendant or his society's tenancy due to their alleged inability to hold a tenancy was a completely new allegation which was never pleaded or even mentioned in the affidavit of the plaintiff filed in support of the application for summary judgment. Hence, this contention of the plaintiff could not be entertained.

[Bahasa Malaysia summary

Pada tahun 1993, plaintif menjadi pemunya sebuah bangunan yang sewanya terkawal ('hartanah itu') yang tertakluk kepada Akta Kawalan Sewa 1966 ('Akta tersebut') yang telah disewakan kepada pertubuhan defendan sejak 1941. Pertubuhan tersebut telah menduduki tingkat pertama hartanah tersebut, manakala tingkat bawah ('premis tersebut') telah disewakan pula oleh pertubuhan tersebut kepada dua orang penyewa kecil. Plaintif telah mengeluarkan surat kepada penyewa kecil tersebut untuk menerima mereka sebagai penyewa bersama tetapi tidak memberitahu defendan. Selepas itu, penyewa kecil itu telah bersetuju mengembalikan milikan kosong premis itu kepada plaintif untuk balasan sebanyak RM1,000 setiap seorang supaya beliau dapat memohon kepada tribunal sewa untuk penyahkawalan premis itu. Kemudiannya, tribunal sewa telah mengeluarkan perakuan

bagi penyahkawalan hartanah itu. Apabila pertubuhan itu mengetahui bahawa penyewa kecil mereka telahpun berpindah, mereka pun menghuni premis tingkat bawah itu dengan serta-merta dan mendakwa bahawa premis tersebut merupakan sebahagian daripada hartanah itu, dan oleh yang demikian premis tersebut harus dikembalikan kepada mereka sebagai penyewa utama. Defendan juga mengata bahawa kedua-dua beliau dan pertubuhan itu tidak diberitahu tentang percubaan plaintif untuk menukarkan penyewaan kecil itu kepada penyewaan bersama dan mereka juga tidak disampaikan dengan sebarang perakuan yang dikeluarkan oleh tribunal sewa yang mengisytiharkan bahawa premis tersebut telah dinyahkawalkan. Plaintif mendakwa defendan untuk, antara lain, pencerobohan, dan juga memohon untuk penghakiman terus supaya menyekat defendan daripada memasuki premis tersebut dan menegaskan bahawa apabila premis itu telah diserahkan oleh penyewa kecil, penyewaan bersama telah ditamatkan, lalu memberikannya hak untuk memohon supaya premis tersebut dinyahkawal serta hak untuk menghuni premis tersebut. Pada perbicaraannya, peguam plaintif juga telah membangkitkan isu bahawa defendan dan/atau pertubuhannya tidak kompeten untuk memegang penyewaan hartanah itu di bawah s 9(b) Akta Pertubuhan 1966.

Diputuskan, menolak permohonan itu:

(1) Seksyen 20(2) Akta tersebut membenarkan tuan tanah untuk menganggap penyewa kecil hartanahnya yang sedia ada sebagai penyewa bersama atas pemberitahuan niat sedemikian kepada penyewa, dan selepas itu, penyewaan bersama itu akan wujud seakan-akan tuan tanah sendiri yang menyewakan premis tersebut secara terus kepada penyewa kecil itu. Seksyen 20(3) Akta tersebut memperuntukkan bahawa jika pemberitahuan sedemikian tidak dibuat, penyewaan kecil yang diwujudkan oleh penyewa akan diteruskan sebagai penyewaan kecil. Di dalam kes ini, 'penyewa' merujuk kepada defendan dan pertubuhannya. Lantaran itu, tanpa pemberitahuan tersebut, percubaan plaintif untuk menukarkan penyewaan kecil kepada penyewaan bersama adalah sia-sia, dan penyewaan kecil terus merupakan penyewaan kecil.

(2) Penyerahan balik premis itu kepada plaintif oleh penyewa kecil itu adalah sama seperti penamatan penyewaan kecil mereka. Sebaik sahaja penyewaan kecil ini ditamatkan, premis tersebut kembali kepada defendan atau pertubuhannya sebagai penyewa utama, kerana di bawah common law, penyewaan kecil wujud daripada penyewaan utama dan tidak boleh wujud dengan sendirinya. Plaintif hanya boleh mengambil milikan premis tersebut dengan persetujuan penyewa utama, jika tidak, plaintif akan memungkiri persetujuan penyewaan kerana gagal memberikan kenikmatan aman sentosa hartanah itu.

(3) Seksyen 24(2) Akta tersebut hanya menyatakan bahawa seseorang yang sedang memegang lepas masa di suatu premis yang

dinyahkawal mengalami kehilangan faedah yang terdapat di bawah Akta tersebut, tetapi ia tidak menyatakan bahawa orang itu ialah seorang penceroboh. Selain daripada itu, supaya premis tersebut disifatkan sebagai telah dinyahkawal, plaintif sepatutnya menyampaikan perakuan yang telah dikeluarkan oleh tribunal sewa untuk menyahkawal hartanah itu ke atas kedua-dua orang penyewa kecil mengikut s 24(2).

(5) Penafian kewujudan dari segi undang-undang penyewaan oleh defendan atau pertubuhannya akibat ketidakupayaan mereka yang dikatakan itu untuk memegang suatu penyewaan adalah suatu dakwaan yang serba baru yang tidak pernah dinyatakan dalam pliding ataupun afidavit plaintif yang difailkan untuk menyokong permohonan bagi penghakiman terus. Maka, hujah plaintif mengenainya tidak boleh dilayan.]

Notes

For cases on the necessity for express pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2613–2629.

For cases on rent-controlled premises, see [1989] Mallal's Digest 983; [1990] Mallal's Digest 735–736; [1991] Mallal's Digest 1440–1443; [1992] Mallal's Digest 1288–1292; [1993] Mallal's Digest 1010–1011.

Cases referred to

Loke Yung Hong v Ng See Lee [1948] MLJ 123 (refd)
Tham Kwee Sin v Gan Khay Beng [1980] 1 MLJ 195 (folld)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449 (folld)

Legislation referred to

Control of Rent Act 1966 ss 20, 20(e), 20(2), 24(1)(b), 24(2)
Societies Act 1966 s 9(b)

ST Lee (*ST Lee & Partners*) for the plaintiff.
TC Tan (*Raja Eleena Siew Ang & Tan*) for the defendant.

James Foong J: The plaintiff is the owner of a double-storey building known as No 26, Jalan Maxwell, Kuala Kubu Baru, Selangor (hereinafter referred to as 'the said property'). The defendant is the president of an association, which has been the tenant of the said property since 1941. The defendant's association occupies the first floor of the said property, while the ground floor was sublet by the defendant's association to:

(a) Thien Yee ('Thien'), the front right portion measuring 8' x 60' at a monthly rental of RM46.50, from 1955; and

(b) Choo Ah Ngau ('Choo'), for the left half portion measuring 8' x 60' at a monthly rental of RM42.50, from 1983.

There is no dispute between the parties that the said property is a rent controlled premises governed by the provisions of the Control of Rent Act 1966, before 3 August 1994.

When the plaintiff became the registered owner of the said property in 1993, he issued through his solicitors a letter to:

(a) Choo, on 6 November 1993, accepting Choo as a joint tenant; and

(b) Thien, on 10 January 1994, accepting Thien as a joint tenant.

On 25 November 1993 and 2 February 1994, the plaintiff entered into an agreement with Choo and Thien, respectively, for premises occupied by them (hereinafter these premises shall be jointly referred to as 'the said premises'), to be vacated, and possession handed over to the plaintiff for a consideration of RM1,000 each. On or before 1 December 1993 and 1 March 1994, Choo and Thien, respectively, vacated the said premises and handed the same to the plaintiff. The plaintiff then proceeded to apply to the rent tribunal to decontrol the said premises. The rent tribunal on 3 August 1994, issued certificates decontrolling the said premises. The defendant and his association having got wind that Choo and Thien had vacated the said premises immediately in July 1994, went downstairs and occupied the same. They now refuse to leave, claiming that they have every right to remain as lawful tenants of the said premises. They based their reason on the assumption that they have always been tenants of the said property which the said premises is a part of, and as such, when Choo and Thien left the said premises, the same should revert back to them as chief tenants. The defendant also pleaded that he or his association had no knowledge of the attempts by the plaintiff to convert Choo's and Thien's subtenancies into joint tenancies, since no notification was ever served on him or his association, nor was he or his association served with any certificate issued by the rent tribunal declaring the said premises as decontrolled.

The plaintiff, dissatisfied with the occupation by the defendant and his association on the said premises, brought an action against the defendant for trespass and prayed for vacant possession of the same. He then proceeded to apply for summary judgment to restrain the defendant, his agents and servants from entering and remaining on the said premises, and that they do vacate the same. This is the application before this court for determination.

The plaintiff's main contention is that he has every right to occupy the said premises since the same were surrendered to him by the joint tenants, Choo and Thien. By such surrender, these joint tenancies were terminated, giving him the right to apply for the said premises to be decontrolled.

Section 20 of the Control of Rent Act 1966 (hereinafter referred to as 'the said Act') allows the landlord to treat existing subtenants of his property as joint tenants upon notification to the 'tenant', and thereupon the joint tenancies shall exist as if the landlord himself has directly let such

premises to such subtenants. Though it is not in dispute that the plaintiff has every right to such election, which he has exercised, s 20(2) of the said Act expressly requires the landlord intending to exercise such right to serve notice of such intention on the tenant. The 'tenant' obviously in this case, refers to the defendant and his association, for the purpose of this exercise is to terminate and/or assign such subtenancies from the chief tenant to the landlord. Without any such notification, how would the chief tenant be expected to know of this change and/or deprivation of their contractual rights with their subtenants. Though there are notifications to create Choo and Thien as joint tenants, there is no evidence of such notification served on the defendant or his association as tenants. Such being the case, s 20(3) of the said Act provides that 'where no such notification is made the subtenancy so created by the tenant shall continue as subtenancy'. The attempts of the plaintiff to turn the subtenancies of Choo and Thien into joint tenancies were therefore futile, and Choo and Thien remained as subtenants at all material times.

Consequent to the above, the next issue would be the legal position of the said premises when Choo and Thien surrendered and delivered possession of the same to the plaintiff. These acts of Choo and Thien were certainly tantamount to a termination of their respective subtenancies, but such termination must be with the chief tenant, for under common law, subtenancies flow from the main tenancy and can have no independent existence apart from the main tenancy — see also the case of *Loke Yung Hong v Ng See Lee* [1948] MLJ 123. Once these subtenancies were terminated, the premises should revert back to the defendant or his association as chief tenant, since the main tenancy to the said property is still in existence. The plaintiff in possession of these premises can only do so with the consent of the chief tenant, otherwise the plaintiff would be in breach of the fundamental term and condition of the tenancy with his chief tenant, for failing to provide quiet enjoyment of the said property.

The plaintiff next argued that the said premises had been duly decontrolled by the rent tribunal, and when such premises are decontrolled, the provisions of the said Act no longer apply. Such being the case, the defendant or his association has no right to occupy the said premises.

The said Act never makes any provision for the expulsion of any person occupying premises that are decontrolled. Section 24(2) of the said Act only expresses that a person holding over in decontrolled premises is deprived of the enjoyment and benefits of the said Act; it never provides that that person is a trespasser and should be evicted from the premises. Under these principles, this court finds no merits in the plaintiff's above contention, especially when the plaintiff himself may not even have the legal right to the said premises in the first place. Further, in order for the premises to have the effect of decontrolled premises, the certificate issued by the rent tribunal to decontrol such premises must be served on the 'tenant' as provided for under s 24(2) of the said Act. In the context of this case, the 'tenant' to be served with such certificates must obviously be Choo and Thien, for it was they who surrendered their premises under s 24(1)(b) of the said Act in order to enable the plaintiff to purportedly

A apply to decontrol the said premises. However, there are no evidence adduced by the plaintiff to indicate that such certificates were duly served on the 'tenant'. As stated by Ajaib Singh J in the case of *Tham Kwee Sin v Gan Khay Beng* [1980] 1 MLJ 195, 'these provision must be strictly complied with and failure to do so will render ineffective any attempts at decontrolling the premises concerned'.

B At the initial stage of this hearing, the plaintiff's counsel raised an issue that the defendant's association is incompetent to hold a tenancy to the said property. This is for reason that s 9(b) of the Societies Act 1966 requires immovable property of a society to be held by trustees, if not, the instruments relating to the holding of such property must be executed by

C three office bearers for the time being of the society. As decided in the case of *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449:

> ... a ... tenancy cannot be granted to an unincorporated society which has no legal personality, as it is only a composite entity of fluctuating content and not a *persona legalis*.

D Based on these, the defendant and his association (which is a society) have no legal right to be tenants, and remain in the said property in general, and the said premises in particular.

This, certainly is a completely new allegation which was never pleaded or even mentioned in the affidavit of the plaintiff filed in support of this

E application for summary judgment. In para 3 of the plaintiff's statement of claim, the plaintiff has even admitted that the defendant's association is his tenant to the first floor of the said property. Further, the plaintiff's own narration of the events leading to his purported attempt to convert the subtenancies of Choo and Thien into joint tenancies clearly implies that he

F has accepted the existence of the defendant or his association's tenancy to the said premises. If the plaintiff wished to deny the legal existence of the defendant or his association's tenancy, he should have pleaded the same as a ground to support his prayers for trespass and eviction, instead of relying on the existence of a tenancy either governed by or excluded from the provisions of the Control of Rent Act 1966. As this matter was never

G pleaded, this court cannot entertain this plaintiff's contention.

Based on the reasons aforesaid, the plaintiff's case cannot be regarded as 'virtually uncontested or uncontestable' to justify summary judgment to be granted. Accordingly, this court rejects the plaintiff's application (encl 8) with costs.

H *Application dismissed.*

Reported by Isabel Liong

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